STATE OF MICHIGAN

COURT OF APPEALS

ANN HASKELL, Personal Representative of the Estate of DONALD A. LOEPP, Deceased,

Plaintiff-Appellant,

v

HARRY COLFER, M.D. and HARRY T. COLFER CARDIAC CONSULTANTS, P.C., d/b/a CARDIOLOGY CONSULTANTS,

Defendants-Appellees.

UNPUBLISHED
September 20, 2005

No. 262361
Emmet Circuit Court
LC No. 05-008578-NH

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7). We reverse and remand for further proceedings.

Plaintiff commenced this medical malpractice action on January 14, 2005, alleging that defendant Harry Colfer, M.D., breached the required standard of care in treating her father, Donald Loepp, for a cardiac condition by prescribing an excessive of amount of Digoxin. Plaintiff further alleges that this error substantially caused Loepp's July 28, 1998, cardiac arrest and his death on August 2, 1998. Defendants moved for summary disposition, asserting that plaintiff's claims were time-barred under *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), because the action was not brought within five years of the alleged malpractice pursuant to the wrongful death savings provision, and because the action was not commenced within six years of the alleged malpractice pursuant to the period of repose contained in MCL 600.5838a(2). The trial court granted defendants' motion for summary disposition on the basis that plaintiff "should have discovered" her claim earlier pursuant to the discovery provision of MCL 600.5838a(2). We disagree.

This Court reviews de novo a trial court's decision to grant a motion for summary disposition. *Ousley v McLaren*, 264 Mich App 486, 490; 691 NW2d 817 (2004). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.'" *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002), quoting *Novak v*

Nationwide Mut Ins Co, 235 Mich App 675, 681; 599 NW2d 546 (1999) (alteration by *Young*). This issue also presents a question of statutory interpretation that is reviewed de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Plaintiff's claim accrued on July 22, 1998, when Colfer prescribed the allegedly excessive amount of Digoxin to Loepp. MCL 600.5838a(1); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 220; 561 NW2d 843 (1997). Because plaintiff did not file her complaint until January 14, 2005, her complaint would be barred under the general two-year statute of limitations for malpractice actions. MCL 600.5805(6). Plaintiff, however, asserts that she did not discover the existence of her claim until June 21, 2004, when she and her sister reviewed their father's medical records for the first time and learned that he had been suffering from Digoxin toxicity at the time of his cardiac arrest. See MCL 600.5838a(2). Thus, plaintiff argues she had six months from June 21, 2004, to commence this action.

In *Solowy*, our Supreme Court held that the

> six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. [*Solowy*, *supra* at 232.]

Here, while plaintiff knew of the injury to her father when he suffered a cardiac arrest, plaintiff had no reason to suspect that an act or omission by Colfer was related to that cardiac arrest, considering Loepp's history of cardiac problems. Both plaintiff and her sister aver that they were not told that Loepp had been prescribed Digoxin or that laboratory results showed that his Digoxin levels were elevated. Without this information, there were no objective facts showing a possible causal link between Loepp's death and Colfer's actions. Thus, the six-month discovery rule period did not begin to run until plaintiff became aware of such information on June 21, 2004. *Solowy*, *supra* at 232. It was at that point that plaintiff was "equipped with the necessary knowledge to preserve and diligently pursue [her] claim." *Id*. at 223. Accordingly, considering the facts presented, plaintiff has met her burden of showing that she "neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim." MCL 600.5838a(2).

Because "the six-month discovery rule is a 'period of limitation,'" *Miller v Mercy Memorial Hosp Corp*, 466 Mich 196, 202; 644 NW2d 730 (2002), and a notice of intent was served on defendants on July 16, 2004, less than 182 days prior to the end of that period of limitation, MCL 600.5856(c) tolled the running of that period of limitation for 182 days. MCL 600.2912b(1); MCL 600.5856(c); *Omelenchuk v City of Warren*, 461 Mich 567, 575; 609 NW2d 177 (2000), overruled on other grounds by *Waltz*, *supra* at 655. Plaintiff's service of the notice of intent also tolled the running of the six-year statute of repose contained in MCL 600.5838a(2). MCL 600.5856(c). Accordingly, plaintiff's complaint was timely filed on January 14, 2005.

We reject defendants' assertion that *Waltz* controls the outcome of this case. The majority decision in *Waltz* did not address the six-month discovery period of limitation contained in MCL 600.5838a(2), and the Court's holding —that MCL 600.5856(c) does not toll the additional period provided for filing an action under the wrongful death savings provision, *Waltz*,

supra at 648— is inapplicable to the facts of this case. See *Lipman v William Beaumont Hosp*, 256 Mich App 483, 491; 664 NW2d 245 (2003) (concluding that the wrongful death savings provision is irrelevant when the applicable statute of limitation has not expired).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello